

# Clearing The Smoke: Provider Concerns and Medical Marijuana

North Dakota Medical Association  
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by  
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# Historical Perspective

- For most of American history, marijuana was legal to grow and consume
- It was legally used by American doctors to treat a variety of ailments
- Beginning in 1910's, states moved to criminalize marijuana for the first time

# Historical Perspective (cont.)

- In 1937, the federal government first began regulating marijuana by taxing it
  - The Marijuana Tax Act
- In 1970, Controlled Substances Act (CSA) was enacted
  - Marijuana classified as Schedule 1 drug
- After CSA, marijuana criminalized in all 50 states

# Shift in Marijuana Policy

- State level
  - 1996—California became 1<sup>st</sup> state to legalize medical marijuana
- Federal level
  - CSA—criminal non-enforcement policy
    - » 2009 Obama administration
    - » 2013 Cole Memorandum (U.S. Dept. of Justice)
    - » 2014 Congress de-funded enforcement
    - » 2018 Rohrabacher-Blumenauer Amendment

# Shift in Marijuana Policy (cont.)

- Bank Secrecy Act
  - » Prohibits bank accounts for marijuana business
  - » FinCEN 2014 guidance—allow bank accounts if business state licensed and strict regulatory oversight
- DEA/FDA
  - » August 2016 Memo –Unwilling to reclassify marijuana, but agreed to participate in medical research programs regarding marijuana’s clinical use
  - » Marijuana remains a non-FDA approved drug, but may reconsider if science changes

# Another Shift in Marijuana Policy?—Trump Administration

- “White House expects legalized pot crackdown”
  - Bismarck Tribune Feb. 24, 2017
  - Justice Department will step up enforcement of federal laws against recreational marijuana
    - » Not medical marijuana
- *But*
  - “Trump administration abandons crackdown on legal marijuana” LA Times, Apr. 13, 2018
  - “Trump says he is likely to support ending blanket federal ban on marijuana” LA Times, June 8, 2018
- Rohrabacher-Blumenauer Amendment (2018)
  - Prohibits the US Dept. of Justice from using funds for CSA enforcement in conflict with state medical marijuana programs
  - But does not protect against civil/administrative violations of the law

# The Current Landscape State Medical Marijuana Laws



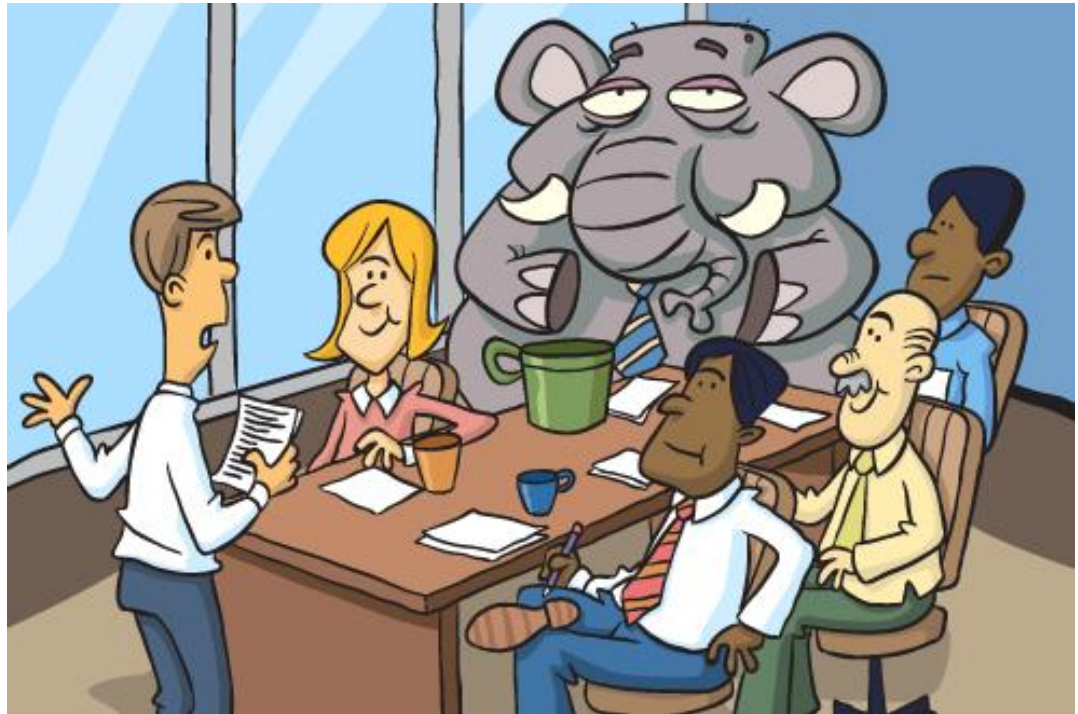
- 33 states have legalized medical marijuana
- Majority decriminalize use
- Others decriminalize use and provide statutory protections against discrimination (i.e. in employment, patient care, housing)
- North Dakota decriminalized “medical use of marijuana”

# Intersection with Federal Law—The Elephant in the Room

Marijuana remains illegal under federal law—CSA Schedule 1 controlled substance

No federally-recognized medicinal value of marijuana

*But*—6/7/18 U.S. Senate Bill (exempt most marijuana-related activities from CSA) and 2018 Rohrabacher-Blumenauer Amendment





# ND's Medical Marijuana Law: The Compassionate Care Act NDCC Ch. 19-24.1

- Legalizes the “medical use of marijuana”
  - » The acquisition, use, and possession of usable marijuana to treat or alleviate a qualifying patient’s debilitating medical condition
- Allowable forms
  - » Capsules, concentrate extracts, tinctures, topical, transdermal patches, dried leaves and flowers
  - » Edibles not allowed

# How a Patient May Obtain Medical Marijuana

- From compassion center
- Qualifying debilitating condition
  - Written certification from physician, physician's assistant, or advance practice registered nurse
  - Apply for registration and obtain registration card
  - Qualifying patient (or designated caregiver) may not purchase more than 2.5 ounces every 30 days and may not possess more than 3 ounces



# Debilitating Conditions

- Cancer
- HIV/AIDs
- Cirrhosis caused by hepatitis C
- Amyotrophic lateral sclerosis (ALS)
- Agitation of Alzheimer's disease or related dementia
- Posttraumatic stress disorder
- Crohn's disease
- Fibromyalgia
- Spinal stenosis or chronic back pain with objective neurological indication of intractable spasticity
- Glaucoma
- Epilepsy
- Anorexia nervosa
- Bulimia nervosa
- Anxiety disorder
- Tourette syndrome
- Ehlers-Danlos syndrome
- Endometriosis
- Interstitial cystitis
- Neuropathy
- Migraine
- Rheumatoid arthritis
- Autism spectrum disorder
- Brain injury
- Terminal illness
- A chronic or debilitating disease or medical condition or treatment for such disease that produces
  - Cachexia or wasting syndrome
  - Severe debilitating pain that has not responded to previously prescribed medication or surgical measures for more than three months or for which other treatment options produced serious side effects
  - Intractable nausea
  - Seizures, or
  - Severe and persistent muscle spasms, including those characteristic of multiple sclerosis

# Role of Physicians, Pas, APRNs



- Provide written certification
  - Patient has a debilitating medical condition
  - Bona fide provider-patient relationship
- Must be ND licensed provider
- Health care provider and qualifying patient information is confidential
- Certification can be rescinded

# Bona Fide Provider-Patient Relationship

- A treatment or counseling relationship between a health care provider and a patient in which all the following are present
  - » The provider has reviewed the patient's relevant medical records and completed a full assessment of the patient's medical history and current medical condition, including a relevant, in-person, medical evaluation of the patient
  - » The provider has created and maintained records of the patient's condition in accordance with medically accepted standards
  - » The patient is under the provider's continued care for the debilitating medical condition
  - » The provider has a reasonable expectation that ongoing care will continue
  - » The relationship is not for sole purpose of providing written certification

# Legal Protections for “Medical Use”

- Registered patient
  - Not subject to arrest or prosecution for the acquisition, use, or possession of usable marijuana or related supplies
  - Not subject to the denial of any right or privilege, including a civil penalty or disciplinary action by a court or occupational or professional regulating entity for the acquisition, use, or possession of usable marijuana or related supplies
- Protection also extends to
  - Designated caregiver, manufacturing facility, dispensary, compassion center agent, person in presence or vicinity of medical use of marijuana, **and health care provider (for providing written certification)**
- **A health care provider is not released from duty to exercise professional standard of care for evaluating or treating a patient’s medical condition**

# Limitations on “Medical Use” (Unlawful Use)

- Activities not authorized under the Act (i.e. selling or transferring marijuana to another person)
- Undertaking an activity under the influence of marijuana if doing so would constitute negligence or professional malpractice
- Violating North Dakota’s anti-smoking law
- Smoking or vaporizing marijuana if smoke or vapor would be inhaled by minor
- Possessing or consuming usable marijuana
  - On a school bus or van used for school purposes
  - On public or private school grounds or school-sanctioned event
  - On grounds of a correctional facility
  - On grounds of child care facility or home daycare
- Operating a vehicle, boat, train, or plane under the influence of marijuana (sufficient to cause impairment)

# Accommodation of “Medical Use” Not Required By:

- Health Insurers (public or private)
  - To reimburse cost of medical marijuana
- Property Owners/Possessors
  - To allow guest, customer, visitor to use marijuana on premises
- Landlords
  - To allow production or processing on rental property
- **Health Care Provider**
  - **To provide written certification**
- Employers
  - To accommodate marijuana in the workplace



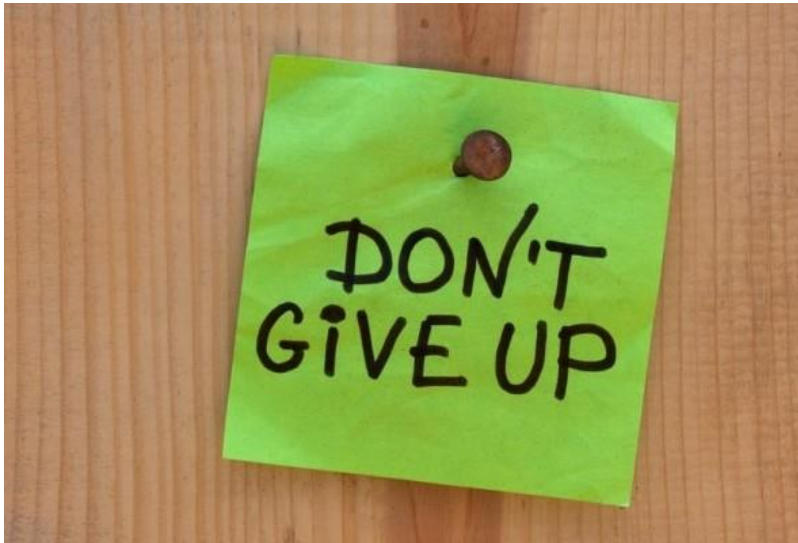
# Provider Considerations

- American Medical Association policy statements
  - Aug. 29, 2019 AMA “Applauds Surgeon General’s Advisory on Cannabis”
  - 2019 Cannabis and Cannabinoid Research H-95-952
  - 2018 Cannabis Legalization for Medicinal Use D-95-969
- Health care provider written certification
  - Strictly comply with the law
  - Bona fide provider-patient relationship
  - Medical basis for certifying use (not required under North Dakota law)
    - » Federation of State Medical Boards, Model Guidelines for the Recommendation of Marijuana in Patient Care, April 2016
    - » Oregon Health Authority, Guidelines for Attending Physicians When Recommending the Medical Use of Marijuana, December 2016

# Provider Considerations (cont.)

- DEA license
  - » *Conant v. Walters*, 309 F.3d 629 (9<sup>th</sup> Cir. 2002)
  - » Prescription v. certification
- State medical/nursing board
  - » Massachusetts Medical Marijuana Law: Considerations for Physicians
- Medical malpractice liability
  - » No published court opinion has thus far considered the issue for a physician certifying or recommending use of medical marijuana

# Challenges



- A legal environment that presents difficult legal questions
  - Federal/State law conflict
  - Inconsistent federal stance
- A trend of expansion of medical marijuana use that is likely to continue
- Continued growth in litigation relating to medical marijuana use
- Challenges are more complicated for providers
  - Need to consider the safety of others besides medical marijuana users

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